IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-696

THE EMPORIUM CAPWELL CO.,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION,
Respondent,

and

No. 73-830

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

WESTERN ADDITION COMMUNITY ORGANIZATION, et al.,
Respondents.

BRIEF IN OPPOSITION TO PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

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Respondent Western Addition Community Organization, which filed the unfair labor practice in this matter to protest the discharge of its two black members, Tom Hawkins and James Joseph Hollins, sub-

mits this brief in opposition to the two above-captioned petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

QUESTION PRESENTED

Whether the court of appeals properly decided that, upon the facts in this case, employees' concerted activity—peaceful distribution of leaflets protesting their employer's racially discriminatory employment practices—did not lose the protection of the National Labor Relations Act because the employer was party to a collective bargaining agreement.

STATEMENT OF THE CASE

Because the decision of the court of appeals below depends so heavily upon "the particular facts of this case," (Pet.App. 18-19)[1] certain of those facts, omitted or obscured in petitioners' briefs, are set out here.

In analyzing the employees' concerted activities in this case, the court below laid special emphasis upon the chronology of events which culminated in their

[1]"Pet.App." refers to the appendix to the petition of The Emporium Capwell Company in No. 73-696, O. T. 1973, seeking review of the subject judgment. Because the decision below is not yet reported, references are made to the court's decision set out in the appendix to the Emporium's petition, "Pet.App.". "A." refers to the appendix to the briefs in the court below; a copy has been filed with the Clerk of this Court.

actions. The analysis included two elements: the persistent attempts made by employees, over a seven month period, to enlist the union in their efforts to eliminate employment discrimination at the Emporium and, secondly, the union's response, over the same period, to these entreaties. Description of these events establishes the good faith nature of the employees' protest, their consistent attempts to work through their union, the union's inadequate response and their eventual conclusion that they needed to act to supplement the union's efforts. On the facts, then, the court below found the employees' concerted activities to be amply justified and hence statutorily protected.

In early spring of 1968, Hawkins, Hollins and other minority employees at the Emporium began to accumulate evidence of the company's racially discriminatory personnel practices (A. 233, 234, 134). In a series of meetings in early April, the minority employees turned much of this evidence over to their union and requested that the union promptly take the necessary steps to remedy the discrimination (Pet.App. 3-4). The employees initiated additional meetings with the union in May (Pet.App. 4) and, again, in September (Pet.App. 5), but it was not until October 16 that the union-management Adjustment Board met to consider the employees' complaints (Pet.App. 6-7).

Not only were the employees forced to wait seven months for the meeting to occur, but—of more importance—the union structured the meeting in such a way that the employees' objectives could not be re-

alized.[2] Accordingly, as the court below stated, the minority employees ". . . read a prepared statement objecting to the presentation of grievances on an individual basis. Those employees did not want to 'speak as individuals', but would act only 'as a group'" (Pet.App. 7). Recognizing the impossibility of achieving satisfactory results through the Adjustment Board and having lost seven months' time trying to work through the union, the employees eventually determined to press their objectives through their own orderly distribution of leaflets to the public (Pet. App. 7-9).

Even though the union's efforts to eliminate discrimination at the Emporium were inadequate, it is important to understand that the union fully subscribed to the employees' goals and, in fact, did not oppose the employees' eventual recourse to leafletting. As early as April, "it became the 'official' position of the union that discrimination against employees belonging to minority races existed in Respondent's [Emporium's] San Francisco store" (Pet.App. 81). The union never retreated from that position.

Nor did the union ever object to Hawkins and Hollins when, in September, they expressed the need for

[2]The court's opinion sets out part of the union's letter requesting the meeting of the Adjustment Board (Pet.App. 6). An earlier portion of that letter refers to the subject grievances as "matters concerning our members employed in the stock and marking areas" (Pet.App. 83). Hawkins and Hollins both worked in the Emporium's "stock and marking areas" (although Hollins was not a union member). Thus the union prepared at the Adjustment Board meeting to confine its attention to employees in only one department in one store in the company and viewed the employees' complaints as individual, not class, grievances.

more immediate and effective action (Pet.App. 6). The union, of course, felt that its organizational options were circumscribed, that is, confined to pursuit of the Adjustment Board and arbitration procedures, by the provisions of its collective bargaining agreement *(ibid)*. On the other hand, the union's principal officer testified that he told the minority employees that "'if they wanted to take any other action they could do it as individuals and do whatever they wanted as individuals'" *(ibid)*.

Consistently with this advice, the union never tried to stop the employees' leafletting when it finally occurred. At least two union officials observed Hollins, Hawkins and the other minority employees while they were handing out leaflets, cautioned them that they were jeopardizing their jobs and expressed their concern that, as one official put it, "I didn't want to see them get fired" (Pet.App. 9-10, A. 134). At no time did the union even suggest that the employees' goals or methods were antithetical to or disruptive of the union's. In fact, once the employees had been discharged, the union filed grievances on their behalf (Pet.App. 10).

The Board's Decision

A three member majority of the Board, summarily adopting its trial examiner's decision, stated that:

> Thus the sole issue presented for decision on this record is whether the conduct of the discharged employees was unprotected because in derogation of the duly designated exclusive bargaining representative. For the reasons stated by the Trial

> Examiner, we agree that the actions of the discharged employees in abandoning the contractual grievance procedure and seeking to initiate direct negotiations with Respondent by picketing and boycott activities were not protected by the Act.
>
> (Pet.App. 55, n. 2).

Two members of the Board dissented in separate opinions (Pet.App. 56-77).

The Court's Decision

The court of appeals reversed the Board's decision, finding that the minority employees' activities, admittedly "concerted" within the meaning of the National Labor Relations Act, were also "protected" and their discharges thus prohibited. After stating the facts and reviewing the applicable labor law principles and cases, the court noted the Board's failure to take cognizance of the important national labor policy to eliminate racial discrimination in employment (Pet. App. 19-22). In the context of this policy, the court found, contrary to the Board, that the employees' activities provided only limited interference with the union's exclusive bargaining representative status (Pet.App. 22-29). The court discussed the doctrine of exclusivity and noted that the purposes and principles underlying the doctrine have little applicability in cases where, like this one, the employees' goal is the elimination of racial discrimination in employment (Pet.App. 23). In this connection, the court emphasized the employees' elaborate attempts to rely upon the union for resolution of their grievances; the

fact that the union and the employees were not working at cross-purposes; and the union's refusal to handle the grievances on a "class" basis as the employees requested. On these facts, the court held that a proper accommodation of the Labor Act to the overriding national labor policy required protection of the employees' activities. The court remanded the case to the Board to consider an issue which it had expressly declined to address:[3] whether the language contained in the employees' leaflet was so disloyal to their employer as to lose the Act's protection.[4]

ARGUMENT

I. THE DECISION OF THE COURT OF APPEALS PROPERLY APPLIES WELL ESTABLISHED PRECEDENT TO THE FACTS OF THIS CASE.

The fulcrum of the lower court's opinion is its observation that ". . . the Board has an obligation in construing the acts which it administers to recognize, and sometimes reconcile, co-existing and perhaps

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[3]The Board's characterization of the court's remand seems incorrect (Board's Pet. 12). The court twice stated the nature of its remand as limited to "the issue of disloyalty" (Pet.App. 19, 29). While the Board asserts in its brief that the remand is directed at an evaluation of the union's efforts to remedy discrimination (Brief at 12), a fair reading of the decision below indicates beyond doubt that the court itself has made that evaluation, on both a legal and factual basis.

[4]The disloyalty question must be answered, as the court appreciated, in light of this Court's rule in *N.L.R.B. v. Local Union No. 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). Thus, this issue, like every other issue in this case, may be resolved by application of established precedent of this Court. Nonetheless, the court apparently deemed it inappropriate to resolve the issue without benefit of the administrative agency's expertise.

inconsistent policies embodied in other legislation" (Pet.App. 21). Thus the court enunciates the principle of statutory accommodation firmly established by this Court in the leading case of *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31 (1942) and its progeny. Consideration of the record compels the conclusion, reached by the court, that the Board unfortunately failed to heed this familiar doctrine of statutory accommodation.

The Board's trial examiner, and the three member Board majority, focused single-mindedly on the question of exclusivity: whether the employees' leafletting activities affected the union's status as exclusive collective bargaining representative. Thus, while the Board presumably intended to implement the exclusivity doctrine in the Labor Act, it utterly failed to consider other significant national labor objectives. But as this Court has said, "the Board has not been commissioned to effectuate the policies of the Labor Relations Act so single-mindedly that it may wholly ignore other and equally important Congressional objectives", *Southern Steamship Co. v. N.L.R.B.*, 316 U.S. 31, 47 (1942). Indeed, as the court below recognized, the Board totally failed to observe the objectives of Congress, the courts and the Board itself in establishing the right to employment free from racial discrimination.

As long ago as 1938, this Court declared "the removal of discrimination . . . by reason of race" to be a paramount objective of our national labor policy, *New Negro Alliance v. Sanitary Grocery Co.*, 303 U.S. 552,

561 (1938). More recently, this policy has been enacted into law by Congress, Title VII of the 1964 Civil Rights Act, 42 U.S.C. 2000e, *et seq.*[5] And, of course, this Court has been emphatic in stating that, in employment, ". . . discriminations based on race alone are obviously irrelevant and invidious", *Steele v. Louisville & Nashville Railroad Co.*, 323 U.S. 192, 203 (1944).

The "duty of fair representation" policies embedded in *Steele* have long been equally applicable in cases under the Labor Act, *e.g., Ford Motor Company v. Huffman*, 345 U.S. 330 (1953). These cases established a union's duty to oppose and to remedy employment discrimination and, concomitantly, the employees' right to insist that that duty be effectively discharged, *United Packinghouse Workers Union v. N.L.R.B.*, 416 F.2d 1126, *cert. denied*, 396 U.S. 903 (1969).

Within this framework, the court of appeals examined and "recognize[d] the important role played by

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[5]Passage of Title VII did not, as the Board asserts in its petition, remove to the E.E.O.C. exclusive authority to remedy employment discrimination. Thus the Department of Justice memorandum, prepared during the course of Senate debate on Title VII and cited by the Board, p. 17, contains the following statement:

> Of course Title VII is not intended to and does not deny to any individual, rights and remedies which he may pursue under other Federal and State statutes. If a given action should violate both Title VII and the National Labor Relations Act, the National Labor Relations Board would not be deprived of jurisdiction.

Legislative History of Titles VII and XI of the Civil Rights Act of 1964 (U.S. Equal Employment Opportunity Commission) 3244. Senator Clark, who introduced the memorandum, therefore stated, regarding Title VII, "It would not affect the present operation of any part of the National Labor Relations Act or rights under existing labor laws," *id* at 3245.

the exclusivity principle in collective bargaining and [felt] that our decision here in no way hampers that role" (Pet.App. 19). In reaching this conclusion, the court found it significant that the employees' protest had a good faith basis,[6] that they had conscientiously tried to rely upon the union and that the union and employees had not been working at cross-purposes. On this last point, the Board's failure to consider Title VII was particularly critical, for that law expressly sanctions both the employees' goals and their methods, 42 U.S.C. §2000e-3(a). Hence, the union could legally object to neither. Indeed, as the facts described earlier in this brief demonstrate, the union did not object.

In addition, regard for the law against employment discrimination makes plain the inadequacy of the union-structured Adjustment Board meeting. The union's failure to appreciate the "class" nature of discrimination in significant part justified for the court

[6]*Cf. McDonnell Douglas Corporation v. Green*, 93 S.Ct. 1817, 1825 (1973), "Other evidence that may be relevant to [determining the reason for the employee's discharge] includes . . . the petitioner's [employer's] general policy and practice with respect to minority employment. On the latter point, statistics as to petitioner's employment policy and practice may be helpful . . ." The Emporium's EEO-1 form, prepared by the company and documenting, by job category and by race, the Emporium's racially discriminatory employment practices, is part of the record (A. 230).

The Board's reference to *McDonnell* is misleading, Pet. at 18. Employee Green in that case had committed and pleaded guilty to criminal trespass upon his employer's premises. The Court's use of the phrase "unlawful, disruptive acts," 93 S.Ct. at 1825, refers to such criminal conduct and has no legitimate application to the kind of orderly, peaceful conduct in which Hawkins and Hollins engaged.

the employees' decision to abandon the union's grievance procedures.[7]

Finally, as the court below explains, even without regard to cases involving racial issues, the Board's "exclusivity" decisions, as reviewed by the courts of appeals, require the Act's protection of Hollins and Hawkins. Some circuits have protected employee action so long as it supported the union's position, *e.g., N.L.R.B. v. R.C. Can Co.*, 328 F.2d 974 (5th Cir. 1964). Other circuits have insisted that, in addition, the employees' activity may not be "disruptive of the concept of orderly collective bargaining," (Pet.App. 17) *e.g., N.L.R.B. v. Tanner Motor Livery, Ltd.*, 419 F.2d 216 (9th Cir. 1969).[8]

Under either test, the employees here deserve the Act's protection. The union's position, as previously described, was to recognize discrimination at the Emporium and to seek to remedy it. Unlike *Tanner,* the employees here attempted to utilize the union. Neither did the employees subvert the union nor undermine its role as often occurs in "wildcat" strike situations. In short, the court found that the employees' concerted activities were justified, reasonable and entitled, under any test, to the protection of the Labor Act.

[7]"[R]acial discrimination . . . is by definition class discrimination." *Huff v. N. D. Cass Co. of Alabama*, ... F.2d ..... (5th Cir. 1973) 6 EPD ¶8800 at p. 5438; *Georgia Power Co. v. E.E.O.C.*, 412 F.2d 462, 468 (5th Cir. 1969); *Bowe v. Colgate-Palmolive Co.*, 416 F.2d 711 (7th Cir. 1969); *Jenkins v. United Gas Corporation*, 400 F.2d 28 (5th Cir. 1968).

[8]See section III *infra* for more extended treatment of *Tanner.*

II. THE COURT OF APPEALS' DECISION IMPOSES NO UNDUE BURDEN ON THE BOARD

The Board's brief pleads that the lower court's decision leaves the Board with "a standard that would be practically impossible to administer," Pet. at 20. Presumably such impossibility refers to the task of reviewing the facts of a case to determine when union efforts to eliminate discrimination are so slight and ineffective as to warrant complementary steps by employees. In fact, the Board commonly makes just such "sensitive" determinations all the time.

The present case should be seen simply as another in the long line of "duty of fair representation" cases, *e.g., Steele v. Louisville & N.R. Co.,* 323 U.S. 192 (1944); *Tunstall v. Brotherhood of Locomotive Firemen,* 323 U.S. 210 (1944); *The Wallace Corporation v. N.L.R.B.,* 323 U.S. 248 (1944); *Ford Motor Company v. Huffman,* 345 U.S. 330 (1953); *Vaca v. Sipes,* 386 U.S. 171 (1967). Such fair representation cases are legion; the present litigation involves precisely the considerations operative in all of them. All have been, and are, administratively manageable.

Indeed there are numerous examples of N.L.R.B. and court adjudication involving "sensitive and delicate considerations," Pet. at 20, which arise under the Labor Act. Apart from fair representation cases, §8(a)(5) duty-to-bargain issues and complaints stemming from union election campaigns, among others, require close attention to the realities of industrial life and, like the present matter, ought to invoke the kind of reasoned expertise which an administrative agency is designed to provide.

III. THE COURT OF APPEALS' DECISION DOES NOT CONFLICT WITH THE OPINIONS OF TWO OTHER CIRCUITS

The Emporium's petition suggests that the instant decision conflicts with those in two other circuits. This is not true.

N.L.R.B. v. Tanner Motor Livery, Ltd., 419 F.2d 216 (9th Cir. 1969) involved two (white) employees who were discharged for picketing their employer in protest over its racially discriminatory hiring practices. As the court below recognized, however, "The two employees had not attempted to utilize their union representative to remedy the situation, and the union's position on their claims was not known." Pet. App. 17. The facts of the two cases, then, are markedly different and the court below took care to point out its agreement with *Tanner* and its reliance upon the facts in the record before it. Indeed, *Tanner* seems to have anticipated the present case, to have stressed the *Tanner* employees' failure to invoke their union's processes and sanction, and explicitly to have refrained from undertaking "to resolve the problem of whether minority members [who had pursued each step that Hawkins and Hollins took] would then be entitled to undertake to achieve their lawful objective by dealing with the employer individually." 419 F.2d at 221.

Moore v. Sunbeam Corporation, 459 F.2d 811 (7th Cir. 1972) is simply inapposite. The principal question in *Moore* was interpretation of the collective bargaining contract. "The critical issue here is whether Moore's conduct violated . . . the agreement between

Sunbeam and the union," 459 F.2d at 816. While Moore was black, considerations of race were only peripherally raised. The Title VII discussion involved purely procedural matters.

CONCLUSION

For the reasons stated above, respondent respectfully prays that the petitions for a writ of certiorari be denied.

Respectfully submitted,

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